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Transmitted VIA E-Mail  
and First Class Mail

July 3, 2008

Honorable Albert M. Pickett

Judge, Superior Courts

Augusta Judicial Circuit

2623 Raymond Avenue

Augusta, GA 30904

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Re: Michael D. Peck on Behalf of Himself and All Homeowners  
Adjacent to Lanier Golf Club f/k/a Canongate on Lanier Golf  
Club v. Lanier Golf Club, Inc., File Number 07CV-2147

Dear Judge Pickett:

Enclosed is the Plaintiff's Reply Post-Hearing Brief for Class Certification. It appears to me that this issue is now ripe for consideration by the court. Please let me know if the court needs anything else from me at this point.

Respectfully,



Robert P. McFarland, Sr.  
rpm

Enclosure

Copy to: Michael D. Peck  
Ms. Andrea Cantrell Jones, Esq.

In the Superior Court  
of Forsyth County  
State of Georgia

Michael D. Peck on Behalf of     )  
Himself and All Homeowners     )   Civil Action  
Adjacent to Lanier Golf Club     )   File Number 07CV-2147  
f/k/a Canongate on Lanier     )  
Golf Club,                         )  
    Plaintiffs,                    )  
v.                                    )  
Lanier Golf Club, Inc.,            )  
    Defendant.                     )

Plaintiff's Post-Hearing Reply  
Brief for Class Certification

Comes now Michael D. Peck ("Plaintiff") on behalf of himself and the 121 proposed class members<sup>1</sup> (collectively, "Class") and shows the court as follows:

Statement of Facts

All Statement of Facts that were listed in the Plaintiff's Post-Hearing Brief for Class Certification of June 5, 2008, are incorporated herein by reference as if it had been set forth verbatim.

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<sup>1</sup> Plaintiff's Exhibit 1.

## Argument and Citation of Authority

Lanier Golf Club, Inc. ("Defendant ") makes only two arguments as to why this court should not grant class certification:

- A. Peck as Class Representative, Lacks a Legally Cognizable Interest in the Outcome of the Case; Therefore, There Is No Actual Case and Controversy and the Case Must Be Dismissed<sup>2</sup>.
- B. Peck Fails to Meet the Requirements of O.C.G.A. § 9-11-23 (a)<sup>3</sup>.

### A. Plaintiff has No Interest in the Case

Defendant complains that the Plaintiff lacks a "Legally Cognizable Interest in the Outcome of the Case." However, it does not take a rocket scientist to figure out that an enormous residential development replacing a golf course will have a substantial, actual, material, tangible effect on the adjoining property owners. In support of the Defendant's absurd claim that the Plaintiff has nothing to lose by the development of the Golf Course, they cite *McGarry v. Cingular Wireless, LLC*, 267 Ga. App. 23, 34 (2004). Defendant then makes the ludicrous argument that this case is "a factual situation analogous to the instant case." On the other hand, the facts in *McGarry* and the instant case are separated by a wide chasm.

Mr. McGarry sought to certify a class of individuals who had received unsolicited facsimiles advertising Cingular's cellular telephone services. He wanted to include all persons located within the 561, 954 and 305 area codes who received an

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<sup>2</sup> Defendant's Brief, Page 13, ¶ 3.

<sup>3</sup> Defendant's Brief, Page 18, ¶ 2.

unsolicited facsimile advertisement, which offered Cingular's cellular phone services, at the direction of Cingular's agent, American Cellular. How is this similar to 121 persons that have houses adjacent to a golf course?

Next, the Defendant argues that the Plaintiff's claim is "dead" as contrasted with a "live" claim<sup>4</sup>. To support their "dead claim theory," the Defendant contends that the Plaintiff cannot satisfy the requirements of a promissory estoppel.

Ironically, this is the very first mention by the Defendant of the legal theory of promissory estoppel. A review of the transcript of the all-day hearing on April 16, 2008, reveals that the words "promissory" and "estoppel" are never mentioned at any time. This is even after the court asked Defendant's counsel to "Give me your best shot on why he should not be in the class, why he cannot be, as you say, the class rep."<sup>5</sup>

The case that the Defendant cites to support their new legal theory is *Knotts Landing Corp v Lathem*, 256 Ga 321 (1986)<sup>6</sup>. It is not surprising that the facts in *Knotts Landing* and the instant case are likewise separated by a great gulf. Even if the facts were similar, which they are not, the holding in *Knotts Landing* does not assist this court in making a decision on class certification in the instant case.

*Knotts Landing* is a Cherokee County case in which residents of a subdivision sought to enjoin the commercial development of a tract of land adjacent to their subdivision. The trial court denied the developers' motion for summary judgment. The Supreme

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<sup>4</sup> Defendant's Brief, Page 15, ¶ 1.

<sup>5</sup> Transcript, Page 15, Line 25 - Page 16, Line 2.

<sup>6</sup> Defendant's Brief, Page 15, ¶ 3.

Court held that oral assurances made by developers to purchasers of lots that neighboring property would be restricted to single-family residential homes raised an issue of fact as to the content of the restrictions claimed by the homeowners: "Evidence of oral assurances of restrictions certainly raises an issue of fact as to the content of the restrictions claimed by the appellees. See *Westhampton*, supra at 645, 182 S.E.2d 430." Therefore, nothing in *Knotts Landing* supports the Defendant's theory that the Plaintiff has a dead claim or no claim at all.

B. Requirements of O.C.G.A. § 9-11-23 (a)

The second reason that the Defendant claims the court should not grant class certification is that the Plaintiff failed to comply with all the requirements of Subsection (a) the class action statute. However, their first statement under this argument is that there is a failure of Subsection (b). Defendant claims that the Plaintiff's brief "tracks the language in O.C.G.A. § 9-11-23 (b)(3)." Therefore, Defendant assumes that the requirements of Subsection (b)(3) must be met. This argument is in the same left field as the other arguments and nothing could be further from the truth. Clearly, the Plaintiff certified to the court over and over again at the hearing that this class actions' sole purpose is a declaratory judgment which is controlled by § 9-11-23 (b)(2) not § 9-11-23 (b)(3):

THE COURT: So, this is a class action for declaratory judgment.

MR. MCFARLAND: Yes. We haven't asked for anything from them in damages, unlike all the other class actions. The case they cited has Mike Bitzel in it and he's the person I've been consulting with. And in all of his cases he's asking for damages so they go to Subsection B-3. We're in just B-2.

THE COURT: You just want a status declaration.

MR. MCFARLAND: That's right.

THE COURT: How about that, Mr. Dillard? He just wants a status declaration.

The Defendant then dedicates just over two pages<sup>7</sup> of their 25 page brief to address the four listed requirements of § 9-11-23 (a). With respect to Numerosity, to make the unrelated argument that the adjacent owners never received a promise of golf course restrictions: "... neither Peck nor any of the Affiants have alleged that they were induced by *promises* of restrictions on the Golf Course when they purchased their properties<sup>8</sup>."

The Defendant makes the election to group Commonality and Typicality in the same category. Then they make a short, nonsensical argument that the Plaintiff does not have a common interest with the other adjacent property owners. This is a clever move on the part of the Defendant in that the court has already decided that the Plaintiff has, in fact, satisfied the requirements of commonality. This decision caused Defendant's counsel to attempt unsuccessfully to get the court to reverse its position:

MR. DILLARD: Yes, sir. Not to be argumentative, Your Honor, I just want to understand.

THE COURT: Okay.

MR. DILLARD: So, the commonality is the fact that he [Plaintiff] is an adjacent property owner to the golf course --

THE COURT: Yes<sup>9</sup>.

The essence of the Defendant's argument is that the residential development of the Golf Course will somehow impact the Plaintiff in a different manner than the other 121 adjacent property

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<sup>7</sup> Defendant's Brief, Pages 19-21.

<sup>8</sup> Defendant's Brief, Page 19, ¶ 3.

<sup>9</sup> Transcript of the Hearing, Page 33, Lines 8-13.

owners: "In this case, Peck has asserted commonality and typicality, but does not possess the same interest or suffer the same injury as the putative class members, since Peck does not have a claim as shown above." If we apply the "meat test" [where is the beef?] to this statement, the only thing that is between the bread is the Defendant's statement, over and over again, that "Mr. Peck does not have a claim."

With respect to the final requirement of Adequacy of Representation, the Defendant, once again, resorts to their only defense which is that the Plaintiff does not have a claim: "Peck has not stated a claim for an express restrictive covenant or for an implied restrictive covenant; therefore, despite his fervid belief that he would be an enthusiastic class representative, he is inadequate by virtue of not being a member of the class he seeks to represent<sup>10</sup>." If this single argument is removed from their brief, there is nothing but hot air between their bun.

Even if the Defendant were to convince the court that the Plaintiff does not have a claim, is this what the court should base its decision upon in ruling on this motion? The Appellate Courts of this state say this is not the proper consideration at this time. Below is the holding in just a few of the cases that have been decided on this issue:

In determining the propriety of a class action, the issue to be resolved is not whether the plaintiff will ultimately prevail on the merits of the claim, but whether the requirements of class action statute have been met. *Hammond v. Carnett's, Inc.*, 266 Ga. App. 242 (2004).

[T]he first issue to be resolved is not whether the plaintiffs have stated a cause of action or may ultimately prevail on the merits but whether the

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<sup>10</sup> Defendant's Brief, Page 21, ¶ 4.

requirements of Code Ann. s 81A-123(a) [now O.C.G.A. § 9-11-23(a)] have been met. *Sta-Power Industries, Inc. v. Avant*, 134 Ga. App. 952 (1975).

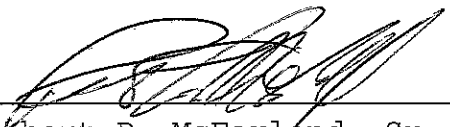
The threshold of commonality is not high and [f]actual differences between class members do not preclude a finding of commonality. *Sta-Power, Supra.* 901.

Plaintiff need only show that there is a common nucleus of operative facts and that such questions predominate over any individual questions affecting individual class members. *Trend Star Continental, Ltd. v. Branham*, 220 Ga. App. 781 (1996).

Whether to allow a case to proceed as a class action in Georgia is a matter of discretion with the trial judge. *Hill v. Gen. Fin. Corp.*, 144 Ga. App. 434, 436 (1977) as cited in *Ford Motor Credit Co. v. London* 175 Ga. App. 33, 35 (1985).

### Conclusions of Fact and Law

Due to the common factual issues relating to the rights of the 121 adjacent homeowners and the common legal relief sought for them, this action is appropriate for class action treatment. Nothing presented in the Brief of the Defendant tends to show that prosecution of separate actions by individual members of the Class would be a preferred method of resolving the issues in this case. Since the Plaintiff satisfies all of the requirements of O.C.G.A. § 9-11-23, certification of the class is required.

  
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## Certificate of Service

This is to certify that I have this day duly served opposing counsel with a true and accurate copy of the Plaintiff's Reply Post-Hearing Brief for Class Certification in a manner prescribed by law by depositing a copy of same in the United States Mail, postage prepaid, addressed as follows:

Ms. Andrea Cantrell Jones  
Law Offices of Dillard & Galloway, LLC  
Suite 760  
3500 Lenox Road  
Atlanta, Georgia 30326

This July 3, 2008.

A handwritten signature in black ink, appearing to read 'R. P. McFarland, Sr.', written over a horizontal line.

Robert P. McFarland, Sr.